

# SENATE RECORD VOTE ANALYSIS

104th Congress  
1st Session

Vote No. 597

December 12, 1995, 2:18 p.m.  
Page S-18391 Temp. Record

## FLAG PROTECTION CONSTITUTIONAL AMENDMENT/Substitute (Biden)

**SUBJECT:** Flag Protection Constitutional Amendment . . . S.J. Res. 31. Biden substitute amendment No. 3093.

### ACTION: AMENDMENT REJECTED, 5-93

**SYNOPSIS:** As reported, S.J. Res. 31, the Flag Protection Constitutional Amendment, will propose the following article as an amendment to the Constitution of the United States, to be valid if ratified by the legislatures of three-fourths of the States within 7 years from the date of its submission by Congress: "The Congress and the States shall have power to prohibit the physical desecration of the flag of the United States." (Prior to conducting any rollcall votes on the resolution, the Senate agreed by voice vote to an amendment to remove the clause "and the States" from the proposed article.)

**The Biden substitute amendment** would propose the following article as an amendment to the Constitution: "Section 1: The Congress shall have power to enact the following law: It shall be unlawful to burn, mutilate, or trample upon any flag of the United States. This does not prohibit any conduct consisting of the disposal of the flag when it has become worn or soiled. Section 2. As used in this article, the term 'flag of the United States' means any flag of the United States adopted by Congress by law, or any part thereof, made of any substance, of any size, in a form that is commonly displayed. Section 3. The Congress shall have the power to prescribe appropriate penalties for the violation of a statute adopted pursuant to section 1."

**Those favoring** the amendment contended:

The Biden amendment is a constitutional amendment. It would make it unlawful to burn, mutilate, or trample upon any flag of the United States, unless the conduct consisted of disposal of the flag when it had become worn or soiled. Those of us who support this amendment agree that the flag should be protected, and we agree that any statutory protection would be insufficient because the Supreme Court would wrongly strike it down. In *United States v. Eichman*, the Supreme Court struck down a content-neutral statute in a narrow, 5-4 decision. That action made it clear that the Supreme Court will consider any law to protect the flag, even if it is content-neutral, as an unconstitutional infringement on the first amendment right to free speech. Therefore, the only avenue left open

(See other side)

YEAS (5)		NAYS (93)				NOT VOTING (1)	
Republicans (0 or 0%)	Democrats (5 or 11%)	Republicans (52 or 100%)		Democrats (41 or 89%)		Republicans (1)	Democrats (0)
	Biden	Abraham	Helms	Akaka	Heflin	Hutchison- <sup>2</sup>	
	Hollings	Ashcroft	Inhofe	Baucus	Inouye		
	Levin	Bennett	Jeffords	Bingaman	Johnston	<b>EXPLANATION OF ABSENCE:</b> 1—Official Buisiness 2—Necessarily Absent 3—Illness 4—Other  <b>SYMBOLS:</b> AY—Announced Yea AN—Announced Nay PY—Paired Yea PN—Paired Nay	
	Nunn	Bond	Kassebaum	Boxer	Kennedy		
	Pell	Brown	Kemphorne	Bradley	Kerrey		
		Burns	Kyl	Breaux	Kerry		
		Campbell	Lott	Bryan	Kohl		
		Chafee	Lugar	Bumpers	Lautenberg		
		Coats	Mack	Byrd	Leahy		
		Cochran	McCain	Conrad	Lieberman		
		Cohen	McConnell	Daschle	Mikulski		
		Coverdell	Murkowski	Dodd	Moseley-Braun		
		Craig	Nickles	Dorgan	Moynihan		
		D'Amato	Pressler	Exon	Murray		
		DeWine	Roth	Feingold	Pryor		
		Dole	Santorum	Feinstein	Reid		
		Domenici	Shelby	Ford	Robb		
		Faircloth	Simpson	Glenn	Rockefeller		
		Frist	Smith	Graham	Sarbanes		
		Gorton	Snowe	Harkin	Simon		
		Gramm	Specter		Wellstone		
		Grams	Stevens				
		Grassley	Thomas				
		Gregg	Thompson				
		Hatch	Thurmond				
		Hatfield	Warner				

is to pass a constitutional amendment. The key difference between the Biden amendment and the underlying resolution is that the Biden amendment would not make any distinction based upon the view being expressed when damaging the flag.

We freely admit that the Biden amendment would limit expressive conduct, which is a form of speech; we add that it is expressive conduct that should be limited. Limits on free speech in America are many and varied, but they are all content-neutral. One may not blare out one's views on a bullhorn in a residential neighborhood, whether one is a Marxist or a patriot. One may not have a parade of nude models to call attention to one's views, no matter what those views happen to be. These means of communication would certainly be effective in garnering attention, but that does not mean that one has an unfettered right to use them. The first amendment is not absolute, nor has it ever been. The core principle of the first amendment is not that no limits may be placed on the time, place, and manner in which people express themselves, but that the limits must apply equally to everyone, no matter what unpopular views they may express. As Justice Scalia recently put it, "The Government may not regulate speech based on hostility or favoritism toward the underlying message expressed."

The underlying resolution will change this fundamental constitutional tenet by barring only acts of "desecration." The act of burning, trampling, or otherwise damaging a flag will only be illegal based on the viewpoint of the person committing the act. For example, an anti-war protestor who burns the flag in protest will be punished, but a supporter of the war who burns it in praise will be beyond the reach of the law. This dichotomy is unacceptable. What we wish to protect is the flag. The viewpoint does not matter. Boy Scouts are taught that when a flag dips to the ground they should run and pick it up; why the flag falls is irrelevant. The flag is special and should not fall. The flag, as the unique and unifying symbol of our Nation, deserves this special protection. It should not be damaged as a form of expression, whether the views expressed are hostile to the Nation or in praise of it.

The Biden amendment would protect the flag without engaging in viewpoint discrimination. Under the Biden amendment, anyone who harmed a flag, for any reason, would be punished. People still would be free to express any views they wished, but one means of expressing those views, no matter what they may be, would be banned. This amendment would provide the protection that is needed. We urge our colleagues to give it their support.

**Those opposing the amendment contended:**

Supporters of the Biden amendment state that they wish to prohibit both the disrespectful and respectful burning, mutilating, or trampling of the flag. Under their amendment, the same punishment would be imposed on the anti-American protestor who spat, upon and burned the American flag as would be imposed on the soldiers of the 13th Regiment at San Juan Hill, who led the charge in that battle that took 1,078 Americans' lives. Those soldiers proudly emblazoned their name across the flag they carried in that battle; under the Biden amendment, they would be punished for violating the Constitution. We do not favor such a result, nor do the American people. A "neutral" flag amendment does not make any sense. A constitutional amendment is needed to protect the American flag from being used or treated disrespectfully, not from being used respectfully.

The need for this amendment did not rise from any defect in the Constitution. For 200 years, this country operated under the principle that it is constitutional to prohibit the desecration of the flag. The need, instead, rose from a modern defect--in 1989, in *Texas v. Johnson* (491 U.S. 397 (1989)), the Supreme Court decided 5-4 that the Federal Government and the 48 States that had laws outlawing flag desecration were wrong to have those laws because those laws violated the first amendment of the Constitution. Some of the laws that were struck down had been on the books for over 100 years. The Supreme Court, though, suddenly found that the burden placed on free speech by barring mistreatment of the flag was greater than the interest that the American people had in protecting this revered, unique symbol. Those laws that were struck down were not content-neutral. For 200 years, it was accepted without question that the right to free speech did not include the right to desecrate the flag. That "right" is a newly minted, court-created "right." S.J. Res. 31 will restore the Constitution to mean what it was understood to mean for 200 years, and to support what over 80 percent of the American people support.

An assumption that supporters of the Biden amendment take for granted is that the free speech clause of the first amendment forbids any restrictions based on content. That assumption is false. For 204 years the free speech clause has never been construed as totally content-neutral. In addition to procedural parameters, such as time and place of speech, there also always have been content parameters for speech. For instance, speech that threatens to cause imminent tangible harm may be prohibited. Speech that threatens certain intangible, even diffuse harms, may also be prohibited. Examples of such speech include obscene speech, which the Supreme Court has defined as pollution of the moral environment, and speech that invades privacy.

Until 1989, the possession of an American flag was commonly understood to carry with it the responsibility to treat it respectfully. No one believed that ownership conferred the license to do with it as one pleased. When an American flag is displayed, it is never the singular property of the person displaying it; that flag is owned by all Americans, and all Americans have a right to demand that it not be mistreated. One may say anything one wishes about the flag, but one may not desecrate it.

The premise behind the Biden amendment, that the motivation of one who damages the flag is irrelevant, is false. Only acts of desecration should be punished--acts that are intended to honor the flag, such as the writing of the name of a military unit across a flag that was carried in battle, should not be. The Biden amendment denies this distinction, and should therefore be rejected.